No. 44964-1

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ARTHUR WEST

Appellant

vs.

PORT OF OLYMPIA

Respondent

APPELLANT ARTHUR WEST'S OPENING BRIEF

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I. INTRODUCTION

The Public Records Act is intended to keep our citizenry informed. Plaintiff and Appellant Mr. Arthur West made a public records request to Defendant and Respondent the Port of Olympia, seeking records in connection to a whistleblower complaint received by the Port concerning one or more of its employees undertaking "improper government action." The Port produced records responsive to this request, including an investigative report, but redacted the report so heavily – claiming a personal privacy exemption -- that it was impossible for Mr. West to understand what the employee was accused of, how the allegations of wrongdoing related to the employee's public duties, what evidence the investigator considered, or even what the investigator concluded. Mr. West and the public have a legitimate interest in learning how the Port responds to and investigates allegations of government wrongdoing. The redactions were so extensive that Mr. West's legitimate interest was thwarted. Additionally, the Port also redacted any identifying details as to the employee. It is Mr. West's position that statute and caselaw, applied to the facts of this case, require that the Port "unredact" all its redactions and release the report and supporting exhibits and emails to Mr. West in full. The Trial Court affirmed the Port's redactions in their entirety. This Court should reverse and remand.

II. ASSIGNMENT OF ERROR

The Trial Court erred in upholding the Port of Olympia's excessive redactions to records responsive to Mr. West's public records act request under a claim of personal privacy exemption. *Did the Port violate the PRA by making unlawfully excessive redactions under claim of privacy exemption, thereby unlawfully withholding responsive records? Yes.*

III. STATEMENT OF THE CASE

This case involves the Port of Olympia's assertion of the personal privacy exemption under the Public Records Act ("PRA," Chapter 42.56 RCW), and the excessive redactions it made to records under claim of that personal privacy exemption in response to Mr. West's PRA request.

In Mr. West's First Amended Complaint, he alleged that he had made a public records request to the Port on July 13, 2012, that requested – among other records – "All communications between the port and counsel concerning PRA matters or PRA requesters." CP 56-57. He also alleged that the Port had produced records responsive to his request on September 12, 2012, and that the Port's response "contained records regarding a whistleblower complaint made by Mr. Kevin Ferguson." CP 57. Mr. West further alleged that he submitted a follow-up request to the

Port on September 13, 3012, of which the Port acknowledged receipt on September 14, 2012. CP 57. This follow-up public records request sought the following four categories of records:

a. All records or correspondence related to Mr. Ferguson's complaints;
b. Any evidence, records or correspondence concerning impropriety, fraud or gross negligence in port contracting;
c. Any correspondence or communications with the State auditor 2011 to present; and
d. Any records requested by Mr. Ferguson, and any records of or related to any consideration, review or processing of his whistle blower complaint.

CP 57. The Port did not dispute these factual allegations. CP 68-70. Mr. West next alleged that "The Port responded to this follow-up request and produced records and an exemption log. The Port's response violated the Public Records Act by making unlawfully excessive redactions under claim of exemption, thereby unlawfully withholding responsive records." CP 57. While the Port admitted responding to the request, the Port denied the other allegations. CP 70.

Mr. West's counsel explained to the Trial Court and to the Port that Mr. West was challenging the Port's "redactions pursuant to the personal privacy exemption," first in a hearing that preceded the filing of the First Amended Complaint (RP 12/21/12, p. 7, ll. 4-5), and later in a letter that post-dated the filing of the First Amended Complaint. CP 258-

259. Mr. West did not and does not challenge any redactions made by the Port pursuant to any other claimed exemption.

The case was set for a show cause hearing, and the parties briefed their arguments to the Trial Court. CP 202-227 100-201; 239-253; 254-288; 295-312; 317-321. The Trial Court reviewed the unredacted records *in camera* (CP 422) and also, on Mr. West's motion, entered an order instructing the clerk to file the records under seal. CP 363-366; 367. The redacted records that Mr. West challenged consisted of a "Port employee Investigative Report by Attorney Chris Burton dated December 2010, consisting of 19 pages plus Exhibits A-O, and five emails associated with the Investigative Report." CP 324. Mr. West caused also to be submitted a copy of the **redacted** report, so that the Trial Court might see the nature and extent of the redactions. CP 260-278.

The Investigative Report appears to summarize the investigation and findings of Mr. Burton into the whistleblowing allegations made by Mr. Ferguson concerning another Port employee. The redactions were such that not only did the Port redact the names and personal pronouns (e.g., "his" or "her") of the subjects of the report, but also redacted the factual details of the allegations of wrongdoing as well as the job descriptions of the employee or employees in question. Representative of the redactions are the following paragraphs:

> The whistleblower complaint letter was addressed to Mr. Ed Galligan, executive director for the Port of Olympia. The letter was a summary of the history of [redacted] at the Port. The letter stated that originally, eight to nine years ago, [redacted]. The letter indicated that Port employees knew the former employee was [redacted] but that it helped the former employee to have food on the table. The letter also stated that this practice continued until the former employee was let go from the Port, and that this practice was found to be acceptable because [redacted].
>
> The letter states that this practice changed direction after the former employee was let go from the Port, and that at this point [redacted]. The letter stated that at one point employees were [redacted] and an employee asked the [redacted]; the [redacted] told the employee no problem. The letter stated that the employee was talking about [redacted]. The letter stated that someone commented about how much [redacted] and that the [redacted] the next day. The complaint is that the [redacted] but no check for such an estimated amount has ever been received by the Port, leaving the whistleblower to believe that the [redacted] kept the proceeds of the [redacted].

CP 262. Also representative is this paragraph:

> Many witnesses stated that [redacted], although [redacted]. These witnesses stated that for the past two years [redacted] and another Port employee [redacted] which were in turn properly deposited through accounting. Although witnesses reported rumors and suspicions about [redacted], no one had direct evidence of such a transaction. Witness who stated that they saw [redacted] leave in a Port vehicle and or [redacted] own vehicle [redacted] could point to no more than two occasions where [redacted] was not accompanied by another Port employee, and stated that these instances would have been in or around 2008.

CP 265. That is, even though the Port argued that it only redacted identifying details about the accused Port employee in question, the

redactions are much broader. In the sentence, "These witnesses stated that for the past two years [redacted] and another Port employee [redacted] which were in turn properly deposited through accounting" (CP 265), the second redaction appears to conceal factual details about a transaction concerning funds, based on the unredacted text: "which were in turn properly deposited through accounting." CP 265. Similarly, in the sentence, "The complaint is that the [redacted] but no check for such an estimated amount has ever been received by the Port, leaving the whistleblower to believe that the [redacted] kept the proceeds of the [redacted]" (CP 262), the first and the third redactions appear not to conceal the identity of a person but factual allegations of particular actions.

In short, Mr. West cannot tell, from the report, what exactly the Port employee was accused of having done, what evidence the Port investigator considered, or even what conclusions the Port investigator reached. "The evidence and statements are inconclusive that [redacted] for personal gain, although the investigator speculates that [redacted] did not." CP 276. "The evidence and statements make it clear that [redacted] exceeded [redacted] authority and more likely than not has engaged in careless and or sloppy practices of internal controls related to [redacted]." CP 276.

The show cause hearing took place on March 22, 2013. The Trial Court, the Honorable Gary R. Tabor presiding, found that the redactions were not overbroad. RP 3/22/13, p. 23, ll. 3-4. The Trial Court held:

> I believe that there is a privacy interest that applies here, and so statements as to the name of the employee, identifying information as to the employee, such as the position that they hold or held and pronouns that address them as he or she and any other identifying information such as a job description of the position.

RP 3/22/13, p. 22, ll. 7-13.

> I find that the redactions in this case are appropriate based upon the privacy of the individual, first as to that individual being disclosed, and then, secondly, as to that individual being exonerated and the accusations against that individual that he or she was exonerated from is proper as far as privacy in this particular case.

RP 3/22/13, p. 23, ll. 5-11.

The Trial Court entered an order on May 10, 2013, dismissing the case. CP 392-415. This appeal followed.

IV. ARGUMENT

"Our broad PRA exists to ensure that the public maintains control over their government, and we will not deny our citizenry access to a whole class of possibly important government information." O'Neill v. City of Shoreline, 170 Wn.2d 138, 147 240 P.3d 1149 (2010). In

concluding that the redactions here were not excessive and were in accordance with law, the Trial Court denied our citizenry access to a whole class of possibly important government information.

> The stated purpose of the Public Records Act is nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions. [RCW 42.56.030]. Without tools such as the Public Records Act, government of the people, by the people, for the people, risks becoming government of the people, by the bureaucrats, for the special interests. In the famous words of James Madison, "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both." Letter to W.T. Barry, Aug. 4, 1822, 9 *The Writings of James Madison* 103 (Gaillard Hunt, ed. 1910).

Progressive Animal Welfare Soc. v. Univ. of Washington, 125 Wn.2d 243, 241, 884 P.2d 592 (1994) ("PAWS").

By holding that the redactions were proper and not in excess of that allowed by law, the Trial Court deprived citizens like Mr. West of the means of acquiring information about the workings of the Port of Olympia and the process by which it investigates and evaluates allegations of government wrongdoing. "The public disclosure act was passed by popular initiative, Laws of 1973, ch. 1, p. 1 (Initiative 276, approved Nov. 7, 1972), and stands for the proposition that *full access* to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free

society. (Italics ours.) [RCW 42.17A.001(11)]." PAWS, 125 Wn.2d at 250-51.

A. The Standard of Review is De Novo

The Trial Court sat as a reviewing court under RCW 42.56.550(3). The Trial Court reviewed the Port's redactions that Mr. West challenged, and owed no deference to the Port's determinations of whether or to what extent a statutory exemption applied. "Judicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo. Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others." RCW 42.56.550(3). Appellate court review of the trial court decision is also de novo if the record consists solely of documentary evidence. *See* Dawson v. Daly, 120 Wn.2d 782, 788, 845 P.2d 995 (1993). Here, the record consists solely of documentary evidence. This Court's review is de novo, and no deference is owed to the Trial Court's determination or to the Port's determination.

B. The Port, a Public Agency, Did not Meet Its Burden Under the Public Records Act

The Port, a public agency, bears a burden under the PRA. While the PRA protects against an unreasonable invasion of personal privacy

interests, the Port must only redact identifying details and produce the remainder of the record. "The PRA requires state and local agencies to produce all public records upon request, unless the record falls within a PRA exemption or other statutory exemption. RCW 42.56.070(1); PAWS, 125 Wn.2d at 250. To the extent necessary to prevent an unreasonable invasion of personal privacy interests protected by the PRA, the agency shall redact identifying details and produce the remainder of the record. RCW 42.56.070(1)." Bainbridge Island Police Guild v. City of Puyallup, 172 Wn.2d 398, 407, 259 P.3d 190 (2011).

Here, the Port redacted not just identifying details – details like the names and personal pronouns ("he" or "she") of Port employees – but other factual details concerning allegations of "improper governmental action" by a Port employee and also concerning the Port employee's duties and responsibilities. Before the Trial Court, the Port argued that the report was left sufficiently unredacted to allow Mr. West to understand the nature of the allegations. CP 332-334. This is not so. While Mr. West understands that one of the Port employees was accused of doing something for personal gain, and that during the course of the investigation other employees raised "concerns about the improper disposal of environmentally sensitive materials, Port employees being directed to undertake unsafe tasks, Port employees being directed to work

holidays" and about failure to use proper accounting procedures (CP 332), so much of the report was redacted so that Mr. West has no idea what exactly the Port employee was accused of having done for personal gain, what "environmentally unsafe materials" were being disposed of improperly, or what unsafe tasks Port employees were directed to undertake. These factual details that the Port redacted went far beyond what was necessary to protect the identity of the Port employee, and far beyond what is allowed by law.

Further, it appears that under caselaw and these particular set of facts, the Port acted improperly even in redacting identifying details like the Port employees' names or personal pronouns. So far as Mr. West can understand the allegations, they are not allegations of sexual misconduct, where the release of an employee's identity in *connection* with an allegation of sexual misconduct would in and of itself be a violation of privacy. Here, there are no such concerns.

The Port bears the burden of showing that the redactions are proper. "The party seeking to enjoin production bears the burden of proving an exemption or statute prohibits production in whole or in part." Bainbridge Island, 172 Wn.2d at 407-08; Spokane Police Guild, 112 Wn.2d 30, 35, 769 P.2d 283 (1989). The Port did not meet its burden.

C. The Port Violated the PRA in Redacting, Under a Claim of Privacy Exemption, Factual Details Concerning the Allegations of "Improper Government Action" By a Port Employee and Factual Details Concerning the Port Employee's Job Description and Duties

The case of Bainbridge Island, 172 Wn.2d 398, is instructive here. That case similarly concerned investigative reports into alleged public employee wrongdoing. Here, the Port excessively redacted an investigative report into alleged "improper government action" by a Port employee, as well as five separate attendant emails. *See* Investigative Report and attendant emails at CP 367. The problem is that the redactions by the Port exceed that which is necessary to protect the privacy of any Port employee. *Cf.* CP 260-278.

In Bainbridge Island, two separate superior courts concluded that entire investigative reports were exempt from production under the personal information exemption, the same exemption here claimed by the Port. "The entire report was exempted, not just [the officer's] name, because the request was specific to information regarding the investigation of [the alleged victim's] allegation against [the officer], and thus any production would reveal his identity in connection with the incident." Bainbridge Island, 172 Wn.2d at 406. Likewise, here the Port withheld factual details about the alleged "improper governmental action" by the Port employee – *in addition to withholding the Port employees' names*

and personal pronouns – and details about the scope of the duties of the Port employee, out of a concern that release of those details would allow a third person to put two and two together and figure out the identity of the Port employee. But the withheld information by the Port exceeds that which is allowed by law. "Under RCW 42.56.050, the Trial Court erred by exempting the [entire reports], rather than producing the report with only [the officer's] identity redacted." Bainbridge Island, 172 Wn.2d at 416. Here, the Port did redacted much more than merely the Port employees' identities.

The Port urged that information in the redacted records constitutes "personal information" under former RCW 42.56.230(2) [now RCW 42.56.230(3)], which the Supreme Court has defined as "information relating to or affecting a particular individual, information associated with private concerns, or information that is not public or general." Bainbridge Island, 172 Wn.2d at 412, *citing* Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405, 164 Wn.2d 199, 210, 189 P.3d 139 (2008). "The PRA exempts from production "[p]ersonal information in files maintained for employees, appointees, or elected officials of any public agency to the extent that disclosure would violate their right to privacy." Former RCW 42.56.230(2) [now RCW 42.56.230(3)]." Bainbridge Island, 172 Wn.2d at 411. To determine whether the redactions made by the Port fall within

this exemption, this Court must first decide (a) whether the redacted material constitutes personal information; (b) whether the Port employee in question has a right to privacy in his or her identity, and (c) whether the production of the Port employee's identity in connection with the alleged and unsubstantiated "improper government action" would violate that right to privacy. Bainbridge Island, 172 Wn.2d at 411, *citing* Bellevue John Does, 164 Wn.2d at 210.

1. Assume for the Sake of Argument that the Redacted Material Constitutes Personal Information.

The redacted material falls into at least three broad categories: (a) the Port Employee's name and pronouns (*e.g.*, "he" or "she"); (b) factual details concerning the allegations of "improper governmental action"; and (c) factual details concerning the Port Employee's duties and responsibilities. Assume, *arguendo*, that these three broad categories of redacted material constitute personal information.[1]

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[1] Here, both Bainbridge Island and Bellevue John Does are distinguishable in one very important respect; in both Bainbridge Island and Bellevue John Does, the alleged wrongdoing was "sexual misconduct." In this case, it appears that the alleged wrongdoing was not sexual misconduct, but some type of "improper governmental action," like the use of the Port employee's public position for personal gain; that the

Port employee exceeded authority and engaged in careless and sloppy practices of internal control; allegations concerning reporting to the Department of Ecology; allegations concerning violations of Port's holiday policy; that the Port employee in question directed another employee to act in some fashion; and that the Port employee may have worked on matters unrelated to Port business. *See, e.g.*, Bird Dec., Exhibit B, pp. 17-19. *See also* p. 3: "The complaint is that the [redacted] but no check for such an estimated amount has ever been received by the Port, leaving the whistleblower to believe that the [redacted] kept the proceeds of the [redacted]."

While Bainbridge Island and Bellevue John Does both found that a public employee's identity in connection with "an unsubstantiated allegation of sexual misconduct," was indeed "personal information" under former RCW 42.56.230(2) [now RCW 42.56.230(3)], Mr. West will attempt to argue, below, that a public employee's identity is connection with multiple substantiated and unsubstantiated allegations of "improper governmental action" is substantively different from the case of an unsubstantiated allegation of sexual misconduct, and that this Court may in that respect distinguish this case from both Bainbridge Island and Bellevue John Does.

2. Assume for the Sake of Argument that the Port Employee Has a Right to Privacy in His or Her Identity

In Bellevue John Does, the Supreme Court held, "An unsubstantiated or false accusation of sexual misconduct is not an action taken by an employee in the course of performing public duties....The fact of the allegation, not the underlying conduct, does not bear on the [public employee's] performance or activities as a public servant....The fact that [a public employee] is accused of sexual misconduct is "a matter concerning the private life" within the Hearst definition of the scope of the right to privacy. Hearst Corp. v. Hoppe, 90 Wn.2d 123, 135, 58 P.2d 246 (1978). Thus, we hold [the public employee] has a right to privacy in [his or her] identit[y] because the unsubstantiated ...allegations are matters concerning the [public employee's] private [life] and are not specific incidents of misconduct during the course of employment." Bellevue John Does, 164 Wn.2d at 215-216; *reiterated* by Bainbridge Island, 172 Wn.2d at 413. Assume, *arguendo*, that the public employee here has a right to privacy in his or her identity *in connection with the allegations of governmental wrongdoing* here.[2]

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[2] Again, Mr. West will attempt to argue, below, that there is a substantive difference between unsubstantiated allegations of sexual misconduct and

3. Production of Records that Only Redact the Port Employee's Name Would Not Violate the Port Employee's Right to Privacy

So, assuming, arguendo, that the three categories of redacted information do constitute personal information, and assuming, arguendo, that the Port employee in question has a right to privacy in his or her identity *in connection with the allegations of government wrongdoing here*, the Port still violated the Public Records Act in making excessive redactions; the production of records that **only** redacted the Port employee's name (and pronouns) would not violate the Port employee's right to privacy.

Under RCW 42.56.050, a person's " 'right to privacy' ...is invaded or violated only if disclosure of information about the person: (1) would be highly offensive to a reasonable person, *and* (2) is not [a matter] of legitimate concern." Bainbridge Island, 172 Wn.2d at 417, *quoting* RCW 42.56.050 (emphasis in Bainbridge Island). This is a two-pronged test. The Port bears the burden of showing both prongs. While Mr. West will

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multiple unsubstantiated allegations of "improper governmental action," and that this Court may, in that respect, distinguish both Bellevue John Does and Bainbridge Island.

argue below that the Port showed neither prong, even assuming that the Port did meet its burden, the redactions were still excessive.

a. The Public Does Have a Legitimate Interest in How the Port Responded to and Investigated the Allegations Against the Port Employee

The Supreme Court has recognized that "when allegations of sexual misconduct are unsubstantiated, the public may have a legitimate concern in the nature of the allegation and the response of the school system to the allegation." Bellevue John Does, 164 Wn.2d at 217 n. 19. Likewise, the Supreme Court held: "Although lacking a legitimate interest in the name of a police officer who is the subject of an unsubstantiated allegation of sexual misconduct, the public does have a legitimate interest in how a police department responds to and investigates such an allegation against an officer." Bainbridge Island, 172 Wn.2d at 416. "The [reports] include matters of legitimate public concern because they include information regarding police departments' investigations of an allegation of sexual misconduct. Because the nature of the investigations is a matter of legitimate public concern, disclosure of that information is not a violation of a person's right to privacy. Because it is not a violation of a person's right to privacy, it does not fall into the category of "personal information" exempt under former RCW 42.56.230(2) [now RCW 42.56.230(3)]." Bainbridge Island, 172 Wn.2d at 417-418.

The Supreme Court ruled, "[h]ere, we exempt from production [the officer's] name and identifying information while disclosing the remainder of the report dealing with the departments' investigations into the allegation. In Bellevue John Does, we exempted the name and identifying information of the teachers from production, while permitting disclosure of portions of the "documents related to the allegations and investigations (subject to redactions), thus maintaining the citizens' ability to inform themselves about school district operations. 164 Wn.2d at 222." Bainbridge Island, 172 Wn.2d at 418. "Under RCW 42.56.050, the trial court erred by exempting the [entire reports], rather than producing the report with only [the officer's] identity redacted." Bainbridge Island, 172 Wn.2d at 416.

That is, under both Bainbridge Island and Bellevue John Does, the Supreme Court held that the Public Records Act required production of the entire reports with only the "name and identifying information" of the accused employee redacted. The Trial Court did not distinguish Bainbridge Island or Bellevue John Does in this respect. The Trial Court did not hold that this precedent did not apply. Rather, the Trial Court erred in its application of Bainbridge Island and Bellevue John Does. The Trial Court concluded that "a privacy interest applies here to statements as to the name of the employee, identifying information as to the employee,

such as the position that the employee holds or held and pronouns that address them as he or she and any other identifying information such as a job description of the position, and that the Port properly redacted these details." CP 424. But the Port did not only redact these details. The Port also redacted the factual allegations of wrongdoing such that it is not possible to understand what, exactly, the Port employee or employees was accused of having done. *See* CP 260-278. And further, Bainbridge Island and Bellevue John Does do not stand for the proposition that a "job description" may properly be redacted out of a public record under a claim of privacy. The Port's redactions exceeded those allowed by the Supreme Court in Bainbridge Island and Bellevue John Does, and the Trial Court erred in affirming the Port's redactions.

This Court should follow Supreme Court precedent and conclude that the public has a legitimate interest in learning about the allegations that the Port employee "undertook improper governmental action" and also the Port's investigations into those allegations. This Court should remand the case back to the Trial Court with direction that the Trial Court order the re-release of the records for which the Port claimed the privacy exemption, with fewer, not more, redactions. The Port should be ordered to "unredact" all material concerning the allegations and the investigations into the allegations. As to the redactions of the Port employee's job

responsibilities and duties, this Court should also conclude that these job responsibilities and duties – being necessary for the Port's investigator to understand the allegations and investigate them – are also necessary for the public to understand the Port's investigation of the allegations, that is, necessary for the public to maintain its "ability to inform [itself] about [Port] operations." Bainbridge Island, 172 Wn.2d at 418. At a minimum, this Court should conclude that the Port erred in redacting and the Trial Court erred in affirming all the redactions save for the redactions of the Port employee's name and pronouns.

Now, it is possible that release of the records with only the Port employee's name and pronouns redacted will result in the public being able to figure out the identity of the Port employee in question. "We recognize that appellants' request under these circumstance may result in others figuring out [the officer's] identity. However, it is unlikely that these are the only circumstances in which the previously existing knowledge of a third party, paired with the information in a public records request, reveals more than either source would reveal alone. We hold that while [the officer's] identity is exempt from production under former RCW 42.56.230(2) [now RCW 42.56.550 (3)], the remainder of the [reports] is nonexempt." Bainbridge Island, 172 Wn.2d at 418.

But applying Supreme Court precedent, the fact that others may be able to figure out the identity of the Port employee is immaterial. "Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others." RCW 42.56.550(3). Even if the release of the report and emails with the job descriptions and the allegations of wrongdoing *unredacted* would result in people figuring out the identity of the Port employee or employees, the public's interest in free and open examination of public records outweighs the possible embarrassment here. The remainder of the report and the emails is nonexempt under Bainbridge Island and Bellevue John Does.

Finally, assume – again, for the sake of argument – that the job descriptions that were redacted by the Port inured to the Port employee's *identity* and were properly redacted by the Port. These redactions were affirmed by the Trial Court. *See* ¶ 12 at CP 424. The Trial Court *did not* hold that any privacy interest applied to the factual details of the alleged wrongdoing. Even if the job descriptions were properly redacted, the **factual details of the alleged wrongdoing** are nonexempt under Bainbridge Island and Bellevue John Does. However, the Trial Court ruled that *all* the redactions made by the Port were proper. It appears that

the Trial Court erred in overlooking the redactions made by the Port that went to the **factual details of the alleged wrongdoing** rather than to (even under the most generous interpretation of "identity") the Port employee's identity. *See, e.g.*, CP 262:

> The letter states that this practice changed direction after the former employee was let go from the Port, and that at this point [redacted]. The letter stated that at one point employees were [redacted] and an employee asked the [redacted]; the [redacted] told the employee no problem. The letter stated that the employee was talking about [redacted]. The letter stated that someone commented about how much [redacted] and that the [redacted] the next day. The complaint is that the [redacted] but no check for such an estimated amount has ever been received by the Port, leaving the whistleblower to believe that the [redacted] kept the proceeds of the [redacted].

This Court conclude that the Port's redactions exceeded those allowed by the personal privacy exemption and should reverse and remand.

D. Alternatively, this Court Should Also Conclude that the Port Violated the PRA in Redacting, Under a Claim of Privacy Exemption, the Identity of the Port Employee

But this Court should not only find that the Trial Court erred in failing to order the "unredaction" of all the factual detail in the redacted records – whether describing the allegations, the job duties, or both. This Court should **also** find that the Trial Court erred in failing to order the "unredaction" of the Port employee's identity. This is not a case where

the public employee was accused of sexual misconduct. Instead, this is a case where the public employee was accused of multiple instances of "improper government action." Accordingly, this can be distinguished from both Bellevue John Does and Bainbridge Island. Those two cases allowed the release of records in which only the individual public employees' names and identifying details were redacted, **because the accusations in question were of sexual misconduct, implicating the right of privacy**. Here, there is no sexual misconduct and no such question of the right of privacy. These are public records and should be disclosed in full, unredacted, under the Public Records Act. "The basic purpose of the public disclosure act is to provide a mechanism by which the public can be assured that its public officials are honest and impartial in the conduct of their public offices." Cowles Pub. Co. v. State Patrol, 109 Wn.2d 712, 719, 748 P.2d 597 (1988).

1. The Port Employee's Identity is Not Personal Information

Both Bellevue John Does and Bainbridge Island found that a public employee's identity **in connection** with an unsubstantiated allegation of sexual misconduct is "personal information" under former RCW 42.56.230(2) [now RCW 42.56.230(3)]. Bellevue John Does, 164 Wn.2d at 211; Bainbridge Island, 172 Wn.2d at 411-12. That is because "An unsubstantiated or false accusation of sexual misconduct is not an

action taken by an employee in the course of performing public duties...." Bellevue John Does, 164 Wn.2d at 215; Bainbridge Island, 172 Wn.2d at 413. "[W]e hold the [public servant] has a right to privacy in [his or her] identi[y] because the unsubstantiated...allegations are matters concerning the [public servant's] private [life] and are not specific incidents of misconduct during the course of employment." Bainbridge Island, 172 Wn.2d at 413. Here, however, the multiple allegations do not appear to concern the Port employee's private life, and do appear to relate to actions taken during the course of employment, that is, "government action." CP 260-278. Indeed, the very title of the investigative report so states: "Investigation to ascertain facts related to a whistleblower complaint that [redacted] undertook improper government action." CP 260.

The Supreme Court, in Cowles Pub. Co. v. State Patrol, kept in mind the comment to §652D of the Restatement (Second) of Torts when discussing the right of privacy:

> Every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself or at most reveals only to his family or to close personal friends. Sexual relations, for example, are normally entirely private matters, as are family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a man's life in his home, and some of his past history that he would rather forget. When these intimate details of his life are spread before the public gaze in a manner highly offensive to the ordinary reasonable

> man, there is an actionable invasion of his privacy, unless the matter is one of legitimate public interest.

Cowles Pub. Co. v. State Patrol, 109 Wn.2d 712, 721, 748 P.2d 597 (1988). Cowles went on to hold "The court must first decide whether the matters to be disclosed involve 'personal privacy' as defined by §652D to wit: the intimate details of one's personal and private life....if the activities reported in the records involve the performance of a public duty, then the interest of the individual in "personal privacy" is to be given slight weight in the balancing test and the appropriate concern of the public as to the proper performance of public duty is to be given great weight. In such situations privacy considerations are overwhelmed by public accountability." Cowles, 109 Wn.2d at 726-27.

Here, the allegations described in the investigative report do not – so far as Mr. West can tell notwithstanding the redactions – appear to involve the intimate details of the Port employee's personal and private life. Instead the activities appear to involve the performance of a public duty. Accordingly, the Trial Court erred in giving great weight to the interest of the Port employee in "personal privacy" and slight weight to the concern of the public in the Port employee's proper performance of his or her public duty.

This Court should conclude that the Port employee's identity, in connection with multiple allegations of "improper government action" does not implicate personal privacy concerns and does not constitute personal information. Bainbridge Island and Bellevue John Does are here distinguishable, because there the public employee's identity **in connection with** unsubstantiated allegations of sexual misconduct *did* implicate personal privacy concerns and constituted personal information. That is not the case here.

2. The Port Employee Does Not Have a Right to Privacy in His or Her Identity

"[W]e hold [the public employee] has a right to privacy in [his or her] identit[y] because the unsubstantiated ...allegations are matters concerning the [public employee's] private [life] and are not specific incidents of misconduct during the course of employment." Bellevue John Does, 164 Wn.2d at 215-216; *reiterated* by Bainbridge Island, 172 Wn.2d at 413. Here, the allegations are not allegations of sexual misconduct and do not concern the Port employee's private life, but are specific allegations of misconduct during the course of employment. Therefore, this Court should conclude that the Port employee here has no right to privacy in his or her identity.

3. Production of Unredacted Records that Include the Employee's Identity Would Not Violate the Employee's Right to Privacy

Under RCW 42.56.050, a person's " 'right to privacy' ...is invaded or violated only if disclosure of information about the person: (1) would be highly offensive to a reasonable person, *and* (2) is not [a matter] of legitimate concern." Bainbridge Island, 172 Wn.2d at 417, *quoting* RCW 42.56.050 (emphasis in Bainbridge Island). The Port must show that both prongs apply in order to meet its burden under the Public Records Act.

a. Disclosure of the Port Employee's Identity in Connection With Multiple Allegations of "Improper Governmental Action" Would Not Be Highly Offensive to a Reasonable Person

This case is distinguishable from Bainbridge Island and from Bellevue John Does. "[T]he offensive nature of disclosure does not vary depending on whether the allegation is substantiated or unsubstantiated," but "is implicit in the nature of an allegation of sexual misconduct." Bainbridge Island, 172 Wn.2d at 415, *quoting* Bellevue John Does, 164 Wn.2d at 216, n. 18. Here, there is no allegation of sexual misconduct. The personal privacy rights discussed in Cowles simply aren't implicated. Disclosure of the Port Employee's identity *in this context and under these facts* would not be highly offensive to a reasonable person.

b. Disclosure of the Port Employee's Identity is a Matter of Legitimate Concern

Disclosure of Port employee's identity is a matter of legitimate concern to the public. It may be that the Port employee in question no longer works for the Port (*see*, e.g., references to "former employee" at CP 262; it may be that the "former employee" is the same employee accused of wrongdoing). The public has a legitimate interest in learning this Port employee's identity, because as a public employee, the Port employee is accountable to the public. Further, even if the allegations against the Port employee were entirely unsubstantiated, the Port would still fail to meet both necessary prongs of its burden; the allegations are not of sexual misconduct and to not pertain to the Port employee's private life, but to the Port employee's performance of his or her public duties. Morgan v. City of Federal Way, 166 Wn.2d 747, 756, 213 P.3d 596 (2009), takes out of context and in dicta a partial holding from Bellevue John Does, a case that was later examined in detail by Bainbridge Island; Morgan's statement as to the holding of Bellevue John Does is itself dicta and need not be considered by this Court.

The Port did not and cannot show that both prongs apply. This Court should conclude that the Trial Court erred in affirming the Port's redactions of the identity of the Port employee.

E. The Port Has Waived Any Attorney-Client or Work Product Privilege As to these Records For Which it Claimed the Personal Privacy Exemption

The Port argued, pursuant to a criminal law case on search and seizure, that the Trial Court might affirm the Port's claimed exemptions on any ground supported by the record. CP 208, *citing* State v. Ellis, 21 Wn. App. 123, 124, 584 P.2d 428 (1978). The Port argued no case law that supports this application in the Public Records Act context, and Mr. West urges this Court to not consider it. But even supposing the Port to be correct, the Port has waived any attorney-client or work product privilege as to these records for which it claimed the personal privacy exemption.

Assume, *arguendo*, that this Court agrees with Mr. West and finds that the personal privacy exemption does not apply to the claimed records, and certainly not to the same extent. This Court must not find that the attorney-client or work product privilege applies to these same redactions in these same records, because the Port has waived the privilege.

On the cover of the 2010 Investigative Report, the author – an attorney hired by the Port -- writes that the report may be protected by both the attorney-client and work product privileges. CP 260. However, the Port has already disclosed the report, heavily redacted, thereby waiving any attorney-client or work product privileges. Both the attorney-client and work product privileges are intended to protect mental

impressions, actual legal advice, theories, or opinions. Hangartner v. City of Seattle, 151 Wn.2d 439, 90 P.3d 26 (2004); RCW 5.60.060(2). But here, the Port did not redact the attorney's mental impressions, legal advice, theories, or opinions. It redacted the Port employee's identity, pronouns, the allegations of misconduct, and the description of the Port employee's duties. Accordingly, the Port has waived any possible attorney-client or work product privileges that may have once attached to the records.

F. Mr. West Requests Attorney Fees and Costs

Mr. West respectfully requests attorney fees and costs here on appeal, pursuant to RCW 42.56.550(4) and RAP 18.1. Mr. West also properly pled a request for attorney fees and costs in his complaint. CP 57.

G. Mr. West Requests Remand

The Trial Court erred in dismissing Mr. West's case, finding that the Port properly redacted the challenged records. This Court should conclude that the redactions were excessive and unlawful, that the Port violated the PRA, that Mr. West – having shown that the Port violated the PRA – is the prevailing party, should award Mr. West his fees and costs on appeal, and should remand the case back to the Trial Court for imposition of statutory penalties and an award of fees and costs below.

V. CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Trial Court affirming the unlawfully excessive redactions made by the Port, conclude that the Port violated the PRA, conclude that Mr. West is the prevailing party, award Mr. West his fees and costs on appeal, and remand the case back to the Trial Court for further proceedings consonant with this Court's ruling.

RESPECTFULLY submitted this 13th day of September, 2013.

CUSHMAN LAW OFFICES, P.S.

By: _*s/ Stephanie M. R. Bird*_____
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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury as follows:

On September 13 2013, I caused the foregoing document to be filed with this Court and served on the undersigned in the manner indicated:

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SIGNED at Olympia, Washington this 13TH day of September, 2013.

*_s/ M. Katy Kuchno*_____
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